STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2005
v	No. 252036 Oakland Circuit Court
ERIC LARNEL TURNER, Defendant-Appellant	LC No. 2003-189288-FH

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possessing with the intent to deliver between 50 and 225 grams of a mixture containing the controlled substance cocaine, MCL 333.7401(2)(a)(iii), and sentenced to a term of ten to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting the testimony of Detective Kevin Cronin concerning the significance and value of the quantity of cocaine possessed by defendant. We disagree.

Because defendant failed to object to the challenged testimony at trial, this issue is not preserved for our review. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). This Court reviews unpreserved claims of error for plain error affecting the defendant's substantial rights. *Id*.

After being qualified as an expert in the field of narcotics investigation, Cronin testified without objection that the fifty-five grams of powdered cocaine at issue here held a street value of approximately $5500 if left "uncut," and up to twice that amount if cut or converted to crack cocaine. Cronin further testified that, in his experience, such extraordinary amounts were held by a person for the purpose of distribution, rather than personal use. In *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991), the defendant challenged the trial court's decision to permit a police officer to testify, as an expert witness, concerning the significance of the quantity and division of drugs allegedly found on the defendant relative to the defendant's intent to deliver. On appeal, this Court found that the trial court properly qualified the police officer as an expert witness based on his training and experience in observing drug use and drug trafficking. *Id*. at 707-708. This Court further concluded that the officer's testimony regarding the quantity and characteristics of the drugs found in the defendant's possession, along with the officer's opinion

that these characteristics indicated that the drugs were for distribution and not personal use, was admissible. *Id*. at 708. In doing so, this Court reasoned that the information contained in the officer's testimony was beyond the knowledge of a layperson and aided the jury in discerning the defendant's intent, and concluded that the evidence was not rendered inadmissible merely because the testimony embraced the ultimate issue concerning defendant's intent to deliver. *Id*.; see also MRE 702.

Like the testimony at issue in *Ray*, *supra*, the testimony at issue here was not within the knowledge of a layperson and, thus, aided the jury in determining defendant's intent. Consequently, the testimony was admissible even though it embraced the ultimate issue of defendant's intent in possessing the cocaine. Accordingly, we find no error, plain or otherwise, in the trial court's decision to admit this testimony at trial.[1]

Defendant next argues that the prosecutor engaged in misconduct by alluding to defendant's prior police contact in his opening statement. Again, we disagree. This Court reviews unpreserved claims of prosecutorial misconduct, such as this, for plain error affecting the defendant's substantial rights, i.e., error that is outcome determinative. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). We find no such deprivation here. The prosecutor's statement did not directly inform the jury that defendant had a police record, and was the only statement made during trial that alluded to any prior contact by defendant with the police. Furthermore, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, thereby dispelling any prejudice that might have arisen from the comment. See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Accordingly, we do not conclude that defendant's substantial rights were affected by the challenged comment.

Defendant also argues that he was denied the effective assistance of counsel as a result of his trial counsel's failure to object to the prosecutor's opening statement, or to Cronin's qualification as an expert witness and subsequent testimony concerning the significance and value of the cocaine. We disagree.

Because defendant did not request a new trial or an evidentiary hearing on the basis of the alleged ineffective assistance of his trial counsel, our review is limited to mistakes that are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

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[1] In reaching this conclusion, we reject defendant's claim that the challenged testimony constituted inadmissible drug profile evidence. In *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995), this Court drew a distinction between the use of drug profiles as substantive evidence and the use of expert testimony explaining the significance of seized contraband, noting that the latter is generally allowed while the former is not. Pursuant to *Ray*, *supra*, Cronin's testimony constituted an admissible explanation of the significance of the quantity and value of the cocaine discovered, not an impermissible recitation of common characteristics that are typical of a person engaged in drug trafficking.

To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that a reasonable probability exists that, but for counsel's error, the result of the proceedings would be different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). However, effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *Id*.

With respect to defense counsel's failure to object to Cronin's qualification as an expert, we note that a witness may be qualified as an expert on the basis of his knowledge, skill, training, or education. MRE 702. Here, Cronin testified that he had been employed as a police officer for more than ten years, the last two of which he had served with the Oakland County Narcotics Enforcement Team. Cronin further testified that, as part of his professional training, he had attended a number of narcotics related classes and seminars sponsored by a variety of law enforcement agencies, and had also participated in the purchase and sale of narcotics in an undercover capacity. This testimony sufficiently established that Cronin was qualified by knowledge, training, and experience to offer the limited drug-related testimony at issue here. See *Ray*, *supra* at 707-708. Consequently, any objection raised by defense counsel regarding Cronin's qualifications to offer testimony on that matter would have been futile and defendant was, therefore, not denied the effective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not ineffective for failing to make a futile argument or advocate a meritless position).

For this same reason, defendant was not denied effective assistance of counsel by his attorney's failure to object to Cronin's testimony concerning the significance of the quantity and value of the cocaine because, as explained above, the testimony was admissible. *Id*.; *Ray*, *supra*. Similarly, because defendant was not prejudiced by the prosecutor's reference to his prior police contact during his opening statement, his counsel was not ineffective for failing to raise an objection to that statement. *Rodgers*, *supra*.

Lastly, defendant argues that he is entitled to resentencing because the trial court relied on a misconception of law in fashioning defendant's sentence. We disagree. Because defendant did not object to his sentence on this ground below, we again review for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

A sentence may be set aside only if it is invalid. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997); see also MCR 6.429(A). A sentence is invalid if it is based on a misconception of law. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). In the present case, however, the trial court did not rely on a misconception of law in sentencing defendant.

As noted above, the trial court sentenced defendant to a term of ten to twenty years' imprisonment. At sentencing, defendant argued that there were substantial and compelling reasons to support a downward departure from the mandatory ten-year minimum sentence formerly required for a conviction under MCL 333.7401(2)(a)(iii).[2] However, the trial court

[2] At the time defendant was charged, a violation of MCL 333.7401(2)(a)(iii) carried a mandatory minimum sentence of ten years in prison. However, the statute was amended by 2002 PA 665, (continued…)

rejected this argument because defendant was currently serving sentence on two unrelated felony convictions. Although the court additionally indicated its belief that defendant would be eligible for parole after serving the first five years of the instant sentence, see MCL 791.234(12), it is clear from the record that the trial court's comment in this regard was unrelated to its decision to forgo a departure from the mandatory minimum sentence of ten years' imprisonment. Consequently, even assuming that the trial court misconstrued defendant's eligibility for parole under MCL 791.234(12), because the court did not rely on this supposed misconception in sentencing defendant, we must affirm defendant's sentence because it is not invalid. *Mitchell*, *supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

(…continued)

effective March 1, 2003. The amendment established an entirely new offense and sentencing scheme. Currently, the offense of delivery of 50 grams or more but less than 450 grams of cocaine is not subject to a mandatory minimum sentence.